

not paid alimony for five months. On September 6, 2006, the circuit court entered an order finding appellant in contempt and ordering him into the sheriff's custody until he posted \$2500 to purge the contempt. Appellant posted a cash bond, was released, and on September 27, 2006, filed a petition to modify the divorce decree to terminate his obligation to pay alimony.

At a hearing on the matter, appellant testified that he had been diagnosed with terminal cancer in March 2006 and had been in and out of the hospital for surgery and chemotherapy since that time. He attempted to offer into evidence the affidavit of his primary physician, but the trial court ruled it was inadmissible hearsay. Appellant then testified that he had been unable to work since his diagnosis and that he sold his marine-repair business because of his health in late 2005. He said that he used all of the money from the sale to pay delinquent taxes owed on the business. He testified that his sole source of income was social security in the amount of \$907 per month. He also testified that he owned no assets. On cross-examination, appellant admitted that he gave four or five guns to his son and that his son, who was his partner in the marine-repair business, purchased and still operated the business with a partner. He also admitted on cross-examination that he lived for free in his parents' old home with Amy Lewis, who purchased the home from his parents. The warranty deed dated October 20, 2006, from appellant's parents to Amy indicated that the property was a gift to Amy. Appellant testified that Amy paid the debt owed on the property. Appellant also testified that he did not own the vehicles located on the property, Amy owned them. He admitted that two of the horses on Amy's property were his and that the others belonged to his son. Finally, he testified that his business cards indicating that he performed marine-repair

services were placed at various marinas before he got sick. He stated that he could no longer work but that the cards were still out in the community.

Appellee testified that, when she was married to appellant, he kept large sums of cash around. She testified that she sold a house in 2004 and in 2005 she traded her 2000 Cadillac Escalade for a 2005 Escalade. She testified that she depended upon the alimony when she made these transactions.

The issue in this case is whether the trial court erred in failing to terminate appellant's alimony obligation. Modification of an award of alimony must be based on a change of circumstances of the parties. *Morse v. Chapman*, 99 Ark. App. 445, ___ S.W.3d ___ (2007) (citing *Herman v. Herman*, 335 Ark. 36, 977 S.W.2d 209 (1998)). The burden of showing such a change in circumstances is on the party seeking the change in the amount of alimony. *Id.* The primary factors that a court should consider in determining whether to award alimony are the financial need of one spouse and the other spouse's ability to pay. *Id.* A finding of changed circumstances warranting the termination of an alimony obligation is a finding of fact that will not be reversed unless clearly erroneous or clearly against the preponderance of the evidence. *Hass v. Hass*, 80 Ark. App. 408, 97 S.W.3d 424 (2003) (citing *Herman v. Herman*, 335 Ark. 36, 977 S.W.2d 209 (1998)).

In its order denying appellant's petition to modify, the trial court found that appellant's testimony was "totally lacking credibility" and that appellant had "embarked on a course of conduct design[ed] to thwart his responsibility to pay alimony." The court found that appellant failed to meet his burden of proof. Specifically, the trial court noted that, while appellant testified that he was forced to transfer his interest in his business to a party willing

to satisfy his tax liability, appellant offered no evidence of how the tax liability was incurred, what happened to the funds which were supposed to have been paid to the State, or why the liability was his responsibility rather than the joint responsibility of him and his partner (his son). The court also found that there was no evidence that appellant made any effort to salvage his business and that appellant's son continued to operate the business in the same location with a new partner. Next, the court found that there was testimony that appellant continued to seek work which would provide income that would be difficult to document or trace. Finally, the court found that there was no medical testimony to support appellant's assertions that he was unable to work or that he was expected to survive only one year from the date of diagnosis of cancer.

Appellant contends that the trial court erred in failing to terminate his alimony obligation. He cites *Morse v. Chapman, supra*, for his contention that it was an abuse of discretion for the trial court to impute income to him where his income had decreased by over fifty percent since the initial award of alimony, appellee's income was greater than his, there were no dependents, and the alimony award required appellant to pay appellee more than he earned. Our holding in *Morse* is not applicable to this case. In *Morse*, we held that the trial court abused its discretion by imputing income to the appellant in that case. In *Morse*, the trial court specifically stated, "if there's a finding that he's capable of making more, then I can impute what he might be able to make and come up with a determination on that." 99 Ark. App. at 447.

First, there is no indication that the trial court in this case "imputed" income to appellant. The trial court found appellant's testimony about his business, his income, and the

effect of his health issues on his ability to work not credible and found that appellant had embarked on a course of conduct designed “to thwart his responsibility to pay alimony.” Appellant testified that circumstances had changed such that he had no income and was unable to earn any. The trial court simply did not believe him. “Changes arising from personal decisions and choices within the control of appellant cannot be urged as a change in circumstances to justify reduction of alimony.” *Taylor v. Taylor*, 8 Ark. App. 6, 9, 648 S.W.2d 505, 507 (1983). Furthermore, we have always deferred to the trial court’s superior position to determine the credibility of the witnesses and the weight to be given their testimony. *Akins v. Mofield*, 355 Ark. 215, 132 S.W.3d 760 (2003). Finally, we did not hold in *Morse* that income could never be imputed to support an award of alimony, only that it was not appropriate in that particular case. *Morse*, 99 Ark. App. at 449, ___ S.W.3d at ___. Neither the trial court’s findings nor appellant’s situation are sufficiently similar to those in *Morse* to apply its holding in this case.

We hold that the trial court’s finding that appellant did not meet his burden of proving a change in circumstances in order to terminate his alimony obligation is not clearly erroneous. Therefore, we affirm the trial court’s order.

Affirmed.

GLOVER and MARSHALL, JJ., agree.